IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1371 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NAVNITRAI CHUNILAL BAVISHI

Versus

PATEL BAVA KARSAN

Appearance:

MR SURESH M SHAH for Petitioner No. 1-2

MR MEHUL S SHAH for Petitioner No. 1-2

NOTICE SERVED for Respondent No. 1

RULE SERVED for Respondent No. 1

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 17/10/2002

ORAL JUDGEMENT

The present Civil Revision Application is filed against the order passed by the learned 4th Joint Civil Judge (SD), Rajkot on 27.8.2001 in application below Exh.1 in Regular Civil Execution Application No. 933 of 2000.

2. Mr. SM Shah and Mr. Mehul S. Shah, ld.

advocates appearing for the petitioners are present. No one appears on behalf of the respondent though notice as well as Rule were served on the respondent.

3. The brief facts, giving rise to the present application, are that in the present matter Execution Application No. 933 of 2000 was filed by the petitioners for executing decree of permanent injunction passed in Regular Civil Suit No. 769 of 1995, praying for removal of construction made in breach of the decree of permanent injunction. The respondent has filed written reply, Exh. 7 admitting the liability to remove the construction and thereafter the Executing Court has issued warrant on 24.11.2000 directing to remove the construction by the Bailiff of the Court.

4. Pursuant to the said order, the Bailiff went to execute the decree. One Mr. Bhikhalal Dansing filed objection at Exh. 36 contending that he is the tenant of the respondent, and he is in possession of the construction sought to be removed. It was also contended that construction was reerected after the removal of the original construction and after passing the order in his favour in Regular Civil Suit No. 769 of 1995 on 30.10.1996.

5. It is further contended that the Executing Court, after hearing the said Bhikhabhai Dansing, rejected the objection raised by him at Exh. 36 vide his order dated 27.8.2001. However, the Executing Court has passed further order below Exh. 1 considering that its attention was drawn to the fact that the Execution Application is barred by law of limitation. On the basis of the contention raised by the said Bhikhabhai in his application exh. 36 which was already rejected by the Executing Court on 27.8.2001 the learned Judge has rejected the Execution Application on the ground that it is time barred after placing reliance on Article 135 of the Limitation Act. It is this order which is under challenge in the present Civil Revision Application.

6. Mr. Mehul S. Shah, ld. advocate appearing for the petitioner strongly urged that the ld. trial Judge has committed a grave error in law and he is not right in rejecting the execution application of the petitioner seeking the execution of the permanent injunction granted by the Court. Mr. Shah has drawn my attention to the decree passed by the ld. Joint Civil Judge (JD) in Civil Suit No.150 of 1969 wherein two fold prayers made by the plaintiff/present petitioner were granted. The first prayer was with regard to the mandatory injunction and so

far as the execution of the said mandatory injunction is concerned, it was already complied with and the construction was removed by the Corporation. However, so far as the second prayer with regard to the perpetual injunction is concerned, as stated earlier the construction was reerected by the said Shri Bhikhabhai and the objection raised by him was rejected. Merely on the basis of the contention raised by the said Shri Bhikhabhai the Executing Court has rejected the execution application on the ground of limitation. Mr. Shah has further drawn my attention to Article 136 of the Limitation Act, which says that the period of limitation for the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court is 12 years, and if the Proviso is taken into consideration then there is no period of limitation as it states that an application for enforcement of execution of the decree granting a perpetual injunction shall not be subject to period of limitation. Keeping this Article in mind if the order passed by the ld. trial Judge is examined, the execution application is made for the purpose of execution of the perpetual injunction and hence the same cannot be thrown on the basis that it is barred by limitation. Admittedly, the Proviso to Article 136 does not specify any period of limitation. Mr. Shah has further submitted that the Executing Court has already passed an order on 24.11.2000 whereby the warrant was issued for the purpose of execution of the perpetual injunction. That order was passed after hearing the parties. Subsequently, it is not open for the Executing Court to pass another order rejecting the execution application on the ground of limitation as the said order is barred by the principle of res judicata. He has invited my attention to Explanation VII of Section 11 of the Civil Procedure Code, which says that "The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree,question arising in such proceeding and a former proceeding for the execution of that decree." On the basis of this Explanation VII, he has contended that what is applicable to the suit is equally applicable to the execution of the suit and hence the learned trial Judge is not justified in passing the impugned order, as earlier he had already issued the warrant for execution of the decree of perpetual injunction.

7. Lastly, Mr. Shah has submitted that even on the basis of the merits of the matter, the order passed by

the learned Judge is not sustainable. He has further submitted that there is apparent contradiction in the order passed by the ld. trial Judge. On the one hand, he has rejected the objections raised by the third party, and on the other hand he has relied on the contentions raised by the third party in the said objections. The issue regarding limitation was raised by the third party in his objections. If the objection raised by the third party is allowed and then the issue regarding limitation would have been taken into consideration the position would have been different. Even in that case also, Article 136 of the Limitation Act would come into play and the execution application could not have been thrown on that ground. Since the decree passed by the trial court is not challenged and since there is no stay against the execution of mandatory as well as the perpetual injunction an application moved by the petitioners, for the purpose of execution of perpetual injunction cannot be thrown out absolutely on erroneous belief of law.

8. Taking overall view of the matter, I am of the opinion that the learned trial Judge has committed error which goes to the root of the matter and thereby he has committed jurisdictional error in rejecting the application filed by the petitioners. This Court, while exercising its revisional jurisdiction, is, therefore, required to interfere in the matter. The jurisdictional error committed by the trial court is required to be cured and the execution application filed by the present petitioners is allowed to be proceeded with. In this view of the matter, the present Civil Revision Application is allowed. Rule is made absolute with no order as to costs.

rmr. [K.A. Puj, J.]